Supreme Court, U.S.
FILED
APR 12 2004
OFFICE OF THE CLERK

No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LAW OF WAR EXPERTS AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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BRIEF OF LAW OF WAR EXPERTS AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a), both parties to this case, namely Theodore B. Olson, Solicitor General, Attorney for Petitioner-Appellees United States of America, George W. Bush, Donald H. Rumsfeld and M.A. Marr, Commander, and Donna R. Newman, Esq., Attorney for Respondent-Appellant Jose Padilla, have consented to the filing of this brief by *amici curiae*.

Amici curiae are experts on the law of war and international humanitarian law.

David J. Scheffer is a visiting professor at Georgetown University Law Center, where he teaches public international law, international institutions law, and international criminal law. He is the former U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and exercised significant responsibility within the U.S. Government for the investigation and prosecution of atrocity crimes (genocide, crimes against humanity, and war crimes) on a global basis. On behalf of the U.S. Government, he negotiated the statutes of and coordinated support for the international and hybrid criminal tribunals of the last decade exercising jurisdiction over atrocity crimes. He is a member of the New York, District of Columbia, and Supreme Court Bars.

Lt. Col. Jeffrey K. Walker (Ret.) is a Senior Fellow at the Institute for International Law and Politics at Georgetown University. He served as a judge advocate in the U.S. Air Force (1988 - 2003). During his tenure, he acted as legal advisor on law of armed conflict policy and implementation and served as law of war advisor to U.S. Air Force Headquarters at the Pentagon. He also taught the law and ethics of war as an adjunct professor of law at the College of William & Mary. He is a member of the Illinois Bar.

They file this brief to bring to the Court's attention critical fundamental guarantees in international humanitarian law that have been overlooked in both the Petitioner's and Respondent's pleadings in this case.

SUMMARY OF ARGUMENT

In this case, the Government has stressed the need to obtain potential intelligence from Respondent Jose Padilla regarding future terrorist acts and has thus sought to justify the extreme measures taken to obtain this information. Such measures include denying Padilla the rights and privileges of a prisoner of war, refusing to bring criminal charges against him, and creating a legal black hole within the territory of the

United States through tortured interpretations of constitutional rights, the law of war, international humanitarian law, and the jurisprudence of this Court—all with the aim of preventing judicial scrutiny. The decision of the Court of Appeals, the pleadings of Padilla's counsel, and other *amicus* briefs address these issues with strong and well-reasoned arguments.

This *amicus* brief addresses only one critical issue that might otherwise be overlooked. In the event this Court reverses (in full or in part) the Court of Appeals and agrees with the Government's contention that "Padilla is an enemy combatant closely associated with al Qaeda and should be detained as such in the course of the ongoing conflict," (Pet. 14), this Court should instruct the Government to provide all fundamental guarantees contained in Article 75 of Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter 1977 Protocol I].[1]

Such fundamental guarantees constitute customary international law binding on the Government by the long usage of civilized states coupled with a universally recognized *opinio juris* reflected in widespread incorporation of these fundamental guarantees into domestic and international legal instruments. These fundamental guarantees include *inter alia* respect for one's honor and religious practices, protection against violence to one's physical or mental well-being, prompt notification of the reasons for one's detention, release from detention with minimum delay, and protection against *post facto* criminalization of one's actions. These customary international law fundamental guarantees are enumerated and memorialized in Article 75 of 1977 Protocol I. As a result, Article 75 constitutes a provision of customary international

[1] International treaties are referred to herein in an abbreviated form. Complete citations are provided in the Table of Authorities.

law protecting Padilla's individual rights and binding upon the Government.

ARGUMENT

I. CUSTOMARY INTERNATIONAL LEGAL NORMS THAT MANDATE FUNDAMENTAL GUARANTEES FOR INDIVIDUAL RIGHTS ARE THE LAW OF THE UNITED STATES.

This Court has held that customary international law, the "customs and usages of civilized nations,"[2] is part of the law of the United States.[3] Customary international law derives from a widespread and consistent practice of nations followed out of a sense of legal obligation (*opinio juris*).[4] The United States, as a State Party to the United Nations Charter and the Statute of the International Court of Justice, has accepted that a secondary source (treaties being the primary source) of applicable law for the International Court of Justice is "international custom, as evidence of a general practice accepted as law."[5] The texts of international agreements not only bind State Parties but can also provide evidence of customary law binding on all states.[6]

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[2] *The Paquete Habana*, 175 U.S. 677, 700 (1900).

[3] *Id.*; *The Nereide*, 13 U.S. 388, 423 (1815) (". . . the Court is bound by the law of nations, which is part of the law of the land."). *See generally* DAVID J. BEDERMAN, CHRISTOPHER J. BORGEN & DAVID J. MARTIN, INTERNATIONAL LAW: A HANDBOOK FOR JUDGES 26-30 (2003); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7-11 (2d ed. 2003).

[4] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

[5] Statute of the International Court of Justice, art. 38(1) (b), 59 Stat. 1055, T.S. No. 993.

[6] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987).

A. U.S. Constitutional Practice, Foreign Practice, And International Treaty Provisions Establish, Through The Conjunction Of State Practice And *Opinio Juris*, That Certain Individual Rights Are Customary International Law.

Each of the fundamental guarantees enumerated in Article 75 of the 1977 Protocol I is common to major legal systems, including "all judicial guarantees recognized as indispensable by civilized peoples."[7] The primary mechanisms for building customary international human rights law include bringing national law and domestic practice into compliance with international principles,[8] incorporating international principles into national constitutional instruments,[9] and invoking

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[7] Article 3 common to the four 1949 Geneva Conventions regarding the treatment of the sick and wounded at sea and on the land, shipwrecked persons, prisoners of war, and civilians. International agreements incorporating the fundamental guarantees included in Article 75 to which the U.S. is a Signatory or State Party include the four 1949 Geneva Conventions, the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 and the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673.

[8] The fundamental guarantees enumerated in Article 75 have long been a part of U.S. and foreign domestic criminal procedure. *See, e.g.*, FED. R. CRIM. P. 5, 6, 16, 23, & 31; Swedish Code of Judicial Procedure, Ch. 24, §§ 4-24 (1979 tr. Burzelius & Ginsburg); German Code of Criminal Procedure, Bk. I, Title IX, §§112-121, Title X, § 134-136a, Title XI, §§ 137-149 (1965 tr. Niebler & Pfeiffer); French Criminal Procedure Code, Bk. I, Title III, §V, arts. 114-118, §VII, arts. 137-138 (1988 tr. Kock & Frase).

[9] Most of the fundamental guarantees that have ripened into customary international law have their foundation in long- respected common law, democratic continental, and U.S. constitutional guarantees. *See, e.g.*, U.S. CONST. amend. I-VIII, XIII-XV, & XIX; THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776); MAGNA CARTA (1297), arts. XX, XXIV, XXXIX, XL, & XLV; CHARTER OF RIGHTS AND FREEDOMS, arts. 7-14 (Canada 1982); DECLARATION OF THE RIGHTS OF MAN, arts. 7-11 (France 1789).

international human rights principles in national policy or diplomatic communications.[10]

Although President Ronald Reagan determined that the United States would not ratify 1977 Protocol I,[11] the few provisions (out of 101 articles) in 1977 Protocol I ultimately contested by the Government did not include Article 75.[12] Indeed, the Deputy Legal Adviser of the U.S. Department of State at the time, Michael J. Matheson, confirmed in explicit terms that Article 75 and most of the other provisions of Protocol I reflected "the principles that we [the United States] believe should be observed and in due course recognized as customary law, even if they have not already achieved that status in their relationship to the provisions of the Protocol."[13]

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[10] The U.S. State Department has issued annual Human Rights Reports for over 25 years. The State Department's human rights homepage states, "The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights." U.S. Department of State, *Human Rights* (2003), *available at* http://www.state.gov/g/drl/hr.

[11] Reagan, President's Message to the Senate Transmitting the Protocol, 23 WEEKLY COMP. PRES. DOC. 91 (Jan. 29, 1987). However, the United States remains a Signatory of 1977 Protocol I.

[12] *See* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT (THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY), OPERATIONAL LAW HANDBOOK 11 (2002) (listing articles of 1977 Protocol I specifically objected to by the U.S. and those (including Article 75) viewed as either legally binding as customary international law or acceptable practice though not legally binding).

[13] Michael Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference (Fall 1987), in* 2 AM. U. J. INT'L L. & POL'Y 419, 422 (1987) [hereinafter "Matheson"]. Significantly, a significant extract of the Matheson article is re-published in OFFICE OF THE LEGAL ADVISER, DEPARTMENT OF STATE, CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988 3434-3435 (1995) [hereinafter DIGEST OF UNITED STATES PRACTICE 1981-1988], thus reflecting official Government policy. In 1977, in a report summarizing "the substantive successes of the [1977 Protocol I] Conference in codifying and developing the law applicable in international armed conflict," the U.S. Delegation wrote: "We take satisfaction from the first codification of the customary rule of proportionality (Article 57), from a good definition of mercenaries which should not be open to abuse (Article 47), and from the minimum humanitarian standards (Article 75) that must be accorded to anyone not entitled to better treatment." JOHN A. BOYD, OFFICE OF THE LEGAL ADVISER, DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1977 918-919 (1979). In a March 29, 1988 memorandum submitted as an affidavit in the case of *U.S. v. Shakur*, 690 F. Supp. 1291 (S.D.N.Y. 1988), Assistant U.S. Attorney Kerri Martin confirmed that the primary concern of the U.S. regarding 1977 Protocol I, as stressed by other Government officials in 1987 and 1988, dealt with issues other than those reflected in Article 75 of 1977 Protocol I: "While the U.S. is of the view that certain provisions in Protocol I reflect customary international law (see, *e.g.*, Treaty Doc. 100-2, *supra*, at X), the provisions on wars of national liberation and combatant and prisoner-of-war status are definitely not in this category." DIGEST OF UNITED STATES PRACTICE 1981-1988, *supra*, at 3441.

Matheson declined to identify which principles had attained by 1987 the status of customary international law, but he made it unmistakably clear that the United States believed that designated provisions of Protocol I, particularly Article 75, should be complied with by the United States. Matheson stated with respect to Article 75:

> We support in particular the fundamental guarantees contained in Article 75, such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions with-out any adverse distinction based upon race, sex, language, religion or

> belief, political or other opinion, national or social origin, or any similar criteria.[14]

Matheson confirmed the applicability of *all* the fundamental guarantees set forth in Article 75, while pointing by means of example to those rights set forth in sections (1), (2), (4), and (5) of 1977 Protocol I.[15] Matheson explicitly agreed with the statement of Professor Theodor Meron that "the United States basically supports the principles and fundamental guarantees articulated in article 75 of Protocol I."[16]

This obligation applies to international armed conflicts, which are covered by 1977 Protocol I. According to the Government, Padilla participated in an international armed conflict.[17] Since 1987, the Government has never authoritatively questioned the applicability of the Article 75 fundamental guarantees as a matter of customary international law. None of the Government's pleadings in the lower courts or before this Court with respect to this case have suggested any

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[14] Matheson, *supra*, at 427.

[15] *Id.* at 427-428.

[16] *Id.* at 432-433.

[17] The Government clearly has determined that the "war on terror" as it pertains to Padilla is an international armed conflict. The President of the United States has described Padilla as "closely associated with al Qaeda, an international terrorist organization with which the United States is at war" and as an individual who "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States." *See* Petitioner's Motion to Expedite Consideration of Petition for Certiorari and to Establish Expedited Schedule for Briefing and Argument if Certiorari is Granted ¶ 2 (Jan. 16, 2004); *see also* Joint Appendix Volume II, *Hamdi v. Rumsfeld*, 282, 349 (4th Cir. 2003) *petition for cert. granted* (U.S. Jan. 9, 2004) (No. 03-6696) (declaration of Deputy Commander Donald D. Woolfolk, Joint Task Force 170, Guantanamo Bay, Cuba, stating in connection with detainees of the "war on terror" that "our nation is engaged in international armed conflict against terrorism.").

contrary opinion concerning the status of Article 75's fundamental guarantees as binding customary international law.

B. Article 75 Of The 1977 Protocol I Enumerates The Rights Established Through Customary International Law As Fundamental Guarantees.

Article 75(3) of 1977 Protocol I reads:

> Any person arrested, detained or interned for actions related to the armed conflict *shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.* Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.[18]

This principle of prompt notification about the reasons for detention mirrors the obligation of the Government to ensure that "judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible."[19] To date, the Government has never confirmed in any of its pleadings that this fundamental guarantee of minimal information about why one is being detained has ever been complied with regarding Padilla. By denying Padilla access to counsel "subject to appropriate security restrictions" until February 11, 2004 (Pet. 12), and keeping Padilla in solitary confinement and incommunicado from any authorities other than his interrogators and presumably the U.S. military personnel directly involved with his detention, the Government has denied federal courts from confirming, even with counsel to Padilla, whether this single fundamental guarantee of due process protection was ever met.

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[18] 1977 Protocol I art. 75(3) (emphasis added).

[19] Geneva Convention III, art. 103.

If this fundamental guarantee was not met "promptly" following Padilla's arrest and detention, then the Government already has violated the principle of customary international law codified in Article 75(3). Although some degree of isolation for a limited period of time may be a necessary step for interrogation for intelligence purposes, the burden is on the Government to show that the minimum information required by Article 75(3) would so impair intelligence-gathering as to *require* open-ended incommunicado detention. Assuming this burden could be met, one must ask why the Government then failed to justify in any of its public pleadings this necessity for noncompliance with the customary international law requirements embodied in Article 75(3). If such an explanation occurs in the Government's classified declarations, then this Court should openly determine whether Article 75(3) requirements have been satisfied. Regardless, intelligence needs do not constitute an ace of trumps that automatically overrides the countervailing minimal rights of the detainee to know why he is being held. A balance must be struck, open to examination and review by the courts.

The customary international law confirmed in Article 75(6) of 1977 Protocol I requires that Padilla "enjoy the protection provided by this Article" until his final release, "even after the end of the armed conflict." As it now stands, if the Government's conduct in this case is endorsed, this Court has no way of confirming that Article 75 protection in fact will continue in the future, including after the end of the "war on terror," particularly in the event criminal charges are brought against Padilla. Although to date no criminal charges have been filed in any court proceedings against Padilla, the customary international law protections set forth in Article 75(4) and Article 75(7) of 1977 Protocol I would apply if this Court were to decide that the Government's classification of Padilla as an "unlawful combatant" or "enemy combatant" is an unwarranted arbitrary act requiring judicial review.

C. Petitioner's Alleged Status As An "Enemy Combatant" In No Way Affects His Entitlement To These Fundamental Guarantees.

Article 75(1) of 1977 Protocol I confirms that all of the fundamental guarantees set forth in Article 75 apply to an individual who fits the profile of Padilla as described by the Government.[20] Article 75(1) states that:

> . . . persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

Since the Government has denied Padilla the status of (and the more favorable treatment accorded) a prisoner of war under the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 [hereinafter Geneva Convention III], and has denied Padilla an objective review of his status as would normally be required pursuant to Article 5 of Geneva Convention III,[21] Padilla holds the status described

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[20] *See* Petitioner's Motion to Expedite Consideration of Petition for Certiorari and to Establish Expedited Schedule for Briefing and Argument if Certiorari is Granted ¶ 2 (Jan. 16, 2004). *See also* Pet. 37 (distinguishing Padilla's status as an enemy combatant from the status of a prisoner of war).

[21] Persons captured in the field during an international armed conflict by an opposing force have the right to have their status determined by a "competent tribunal." Geneva III, art. 5. If the detainee is to be tried for offenses resulting from his participation in hostilities, he has the right to have his status adjudicated before a "judicial tribunal." 1977 Protocol I, art. 45(2). However, independent of any determination of status, a

in Article 75(1) of 1977 Protocol I in the event this Court concludes that Padilla is an "enemy combatant." Padilla's U.S. citizenship is irrelevant for this particular purpose, as the principles embodied in Article 75(1) apply without adverse distinction based upon national origin.[22]

The Government has stressed that Padilla is not charged with any crimes, and therefore need not be accorded any rights associated with a criminal proceeding, such as right to counsel. (Pet. 33). Even if Padilla 1) is recognized by this Court and thus retains his status as an "enemy combatant" and "unlawful combatant" under the law of war as contended by the Government (Pet. 33), 2) is not charged with any crime, 3) does not appear before any court of law (civilian or military), and 4) is detained indefinitely while the "war on terror" continues, he is entitled at least to the three

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detainee is at least entitled to the fundamental guarantees contained in Article 75. Article 45(3) of 1977 Protocol I leaves no doubt: "Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol." 1977 Protocol I, art. 45(3).

[22] *See* Melysa Sperber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 180-183 (2003). Sperber raises the disturbing possibility of the Government claiming that Article 75 fundamental guarantees do not apply with respect to the actions of the Government in relation to its own citizens. Such a claim would defy a plain text reading of Article 75 and the customary law principles embodied therein. Such an interpretation would resurrect a point of view put to rest with the conclusion of the negotiations that culminated in 1977 Protocol I. A further risk is that any foreign government or non-governmental power (such as militia or para-military forces) could assert U.S. non-recognition of such customary law in this case as license (even if unjustifiable) to deny any such rights to U.S. citizens or military personnel de tained abroad.

fundamental guarantees reflected in Article 75(2), (3) and (6) of 1977 Protocol I.

Article 75(2) describes prohibited acts "at any time and in any place whatsoever, whether committed by civilian or by military agents. . ."[23] All members of the U.S. military are periodically trained that commission of any prohibited acts such as those enumerated in Article 75(2) is subject to penal discipline.[24] Therefore, for purposes of this argument and because information about the precise nature of Padilla's detention is publicly unavailable, one must assume that none of the prohibited acts described in Article 75(2) have been or will be committed against Padilla while in military custody.[25]

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[23] "The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (*a*) violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (*b*) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (*c*) the taking of hostages; (*d*) collective punishments; and (*e*) threats to commit any of the foregoing acts." 1977 Protocol I, art. 75(2).

[24] Uniform Code of Military Justice, 10 U.S.C. § 892 (criminalizing failure to obey general order or regulations); CJCSI 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, encl. A, para. 1g (Jan 2000) ("U.S. forces will comply with the Law of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with its principles and spirit during all other operations."); DEPARTMENT OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, paras. 4, 5.3, 5.5 (Dec. 1998) (stating in para. 4 that it is Department of Defense policy to ensure that the "law of war obligations of the United States are observed and enforced by the DOD components"); AIR FORCE INSTRUCTION 51-401, TRAINING AND REPORTING TO ENSURE COMPLIANCE WITH THE LAW OF ARMED CONFLICT, para. 3.1 (1994) (mandating annual training in law of armed conflict); ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, paras. 498-508 (July 1956).

[25] *But see* Thomas E. Ricks, *Commander Punished as Army Probes Detainee Treatment*, WASH. POST, Apr. 5, 2004 at A13; Patrick E. Tyler,

Nonetheless, it would be useful for this Court to remind the Government of the Article 75(2) fundamental guarantees and require that it demonstrate that procedures are in place to prevent any such conduct and, if it occurs, to punish any perpetrator responsible for such prohibited conduct.

II. THE GOVERNMENT IS OBLIGATED TO RESPECT AND ENSURE PROTECTION OF THESE FUNDAMENTAL GUARANTEES.

The fundamental guarantees raised in this pleading are exceptionally important to uphold as legal obligations binding on the Government. The customary international law protections set forth in Article 75 of 1977 Protocol I serve to protect U.S. citizens, including military and other official personnel, engaged or otherwise caught up in armed conflict wherever they may be located in the world. Even if the Government were to dispute a foreign government's designation of an American soldier as an individual not benefiting from more favorable treatment as a prisoner of war under Geneva Convention III, Article 75 ensures that such individual will benefit from the fundamental guarantees set forth in that article as a matter of customary international law. If, as a consequence of this case, the Government is allowed to undermine Article 75 fundamental guarantees, then it will place in peril all U.S. citizens and official personnel who must rely on at least these fundamental guarantees even when a foreign government erroneously or maliciously denies any such individual more favorable treatment under any of the Geneva Conventions. The Government defies established legal authority by acting in such a manner as to undermine such fundamental guarantees for its own citizens, including its military, diplomatic, humanitarian, and intelligence personnel operating abroad.

Ex-Guantánamo Detainee Charges Beating, N.Y. Times, Mar. 12, 2004, at A12.

CONCLUSION

At a minimum, the Petitioner is entitled to the fundamental guarantees described in Article 75 of 1977 Protocol I, including those rights that must be provided to individuals engaged in international armed conflict (as contended by the Government in this case) who do not benefit from any more favorable treatment under the Geneva Conventions of 1949 or the customary international law embodied in 1977 Protocol I. The Government has long expressed its belief that Article 75 reflects customary international law. The individual interests of U.S. citizens and official personnel acting abroad will be profoundly threatened if this Court's decision has the consequence of undermining the customary international legal protections incorporated within Article 75.

Respectfully submitted,

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